ABACO ESTATE v. SELVARAJAH

[A.C.J. (Wan Hamzah F.J.) October 15, 1984]
[Kuala Lumpur – Civil Appeal No. 22 of 1983]

Practice and Procedure – Civil appeal from Sessions Court – Appeal by notice of appeal – Applicability of Subordinate Court Rules 1980 by virtue of Employment Act 1955, s.77(2) – Subordinate Court Rules 1980,O.49 r.2(3) – R.H.C. 1980, O.55 r.13(2).

The respondent resigned on April 30, 1980. Subsequently on January 29, 1982 he made a complaint to the Labour Department against the employer alleging that he had not been paid certain sums of money which became due during the course of his employment in respect of increments of wages, annual leave pay etc. The Penolong Pengarah Buruh allowed his claim and ordered the employers to pay a total sum of $15,569.33. The respondent asked that the appeal be dismissed on the grounds, *inter alia*, that the procedure adopted in this appeal was wrong and not in accordance with Order 55 Rule 13 of the Rules of the High Court, which requires that an appeal should be made by motion, or alternatively the memorandum of appeal dated April 4, 1984 was filed out of time in contravention of Order 55 rule 13(2) of the Rules of the High Court.

Held: (1) the procedure in a civil appeal from a Sessions Court is contained in and regulated by the Subordinate Court Rules 1980, under which an appeal is initiated by a notice of appeal and not by motion;

(2) by virtue of section 77(2) of the Employment Act, the Subordinate Court Rules 1980 apply to the present case;

(3) the burden is upon the appellant to show that the Memorandum of Appeal was filed within time. The Appellant had failed to do so. The appeal should therefore be dismissed, with costs to the respondent.

[*Editorial Note:* The appellant's appeal against the above judgment is pending in the Supreme Court vide F.C.C.A. No. 281/84. The judgment of Wan Hamzah F.J. in this case was cited with approval by the Supreme Court in *Syarikat Maltaco Sdn. Bhd.* v. *Eow Teh Yu & Ors.* [1985] 2 M.L.J. 19 at p.20].

Case referred to:

(1) *Yong Yoke Sung & Ors.* v. *Sungei Way Estate* [1966] 1 M.L.J. 175.

NOTICE OF MOTION.

Anthony Fernandez for the appellant.
Boniface Lobo for the respondent.

Cur. Adv. Vult.

Wan Hamzah F.J.: Selvarajah a/l Thamboo (herein referred to as Selvarajah) was employed by Ban Guan Hin Realty Ltd. (herein referred to as the employers) as a conductor in Abaco Estate which belonged to the employers. Selvarajah resigned on April 30, 1980. On January 29, 1982 he made a complaint to the Labour Department against the employers alleging that he had not been paid certain sums of money which became due during the course of his employment in respect of increments of wages, annual leave pay and overtime wages. He also complained that the employers had made an unauthorised deduction of a sum from his wages. After inquiring into the dispute under section 69 of the Employment Act, Encik Ahmad bin Suratman, Penolong Pengarah Buruh, gave a decision on February 7, 1983 in favour of Selvarajah and ordered the employers to pay a total sum of $15,569.33. Hence this appeal by the employers. By this notice of motion Selvarajah asks that the appeal be dismissed on the following grounds:-

(1) Abaco Estate which is named as the Appellant in this appeal is not a person and has no *locus standi* to appeal;

(2) the procedure adopted in this appeal is wrong and not in accordance with Order 55 Rule 13 of the Rules of the High Court, which requires that an appeal should be made by motion setting out the grounds of appeal, supported by affidavit; or alternatively

(3) the memorandum of appeal dated April 4, 1984 which was filed in this case, was filed out of time in contravention of Order 55 Rule 2(1) of the Rules of the High Court or in contravention of Order 55 Rule 13(2) of the Rules of the High Court.

As regards the first ground, evidence shows that it was Selvarajah himself who first used the words "Abaco Estate" in the Labour Department to refer to his employers, and this led the Penolong Pengarah Buruh to refer to the employers as Abaco estate throughout the proceedings in the Labour Department. On the other hand the employers in their letter of appointment dated March 23, 1959 addressed to Selvarajah made it clear that the employers were Ban Guan Hin Realty Ltd. *vide* Exhibit A. Although the memorandum Exhibit B dated April 29, 1980 addressed to "whom it may concern" was issued in the name of Abaco Estate, its letter head bears the name of Ban Guan Hin Realty Ltd., which is stated therein as the proprietors of Abaco Estate. Because the proceedings in the Labour Department were initiated by Selvarajah expressly against Abaco Estate, the Penolong Pengarah Buruh expressed the order which he made in the following terms:

"I, Ahmad bin Suratman, hereby order Abaco Estate to pay to the State Director of Labour, Selangor on behalf of Selvarajah a/l Thamboo the sum of $15,569.33 being increment of wages, annual leave pay and overtime wages for period from July 1976 to April 1980."

If Selvarajah's objection on the ground that the use of the words "Abaco Estate" is fatal, is to be upheld, it would seem that he would not be able to enforce the order of the Penolong Pengarah Buruh as this order was expressly made against Abaco Estate. I have no doubt that when the words "Abaco Estate" were used in the proceedings in the Labour Department and in this appeal all the parties concerned understood those words as referring to the employers Ban Guan Hin Realty Ltd., the owners of Abaco Estate, and that they mean by those words to refer to Ban Guan Hin Realty Ltd. Therefore I am prepared to order that where the context so requires all references to Abaco Estate in the record should be amended so as to refer to Ban Guan Hin Realty Ltd., so that justice may be done. I am satisfied that the use of the words "Abaco Estate" in place of Ban Guan Hin Realty Ltd. was due to genuine mistake, and that Selvarajah has not been misled by the fact that Abaco Estate was named as the Appellant in this appeal.

In my judgment Selvarajah also fails on the second ground. Section 77 of the Employment Act provides –

"77.(1) If any person whose financial interests are affected is dissatisfied with the decision or order of the Director General under section 69 or section 73 such person may appeal to the High Court.

(2) Subject to any rules made under section 4 of the Subordinate Court Rules Act 1955, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require."

The procedure in a civil appeal from a Sessions Court is contained in and regulated by the Subordinate Court Rules 1980, under which an appeal is initiated by a notice of appeal and not by motion. Therefore pursuant to section 77(2) an appeal against a decision made under section 69 or 73 should be initiated by a notice of appeal and not by motion.

Section 77(2) is in conflict with rule 13(1) of Order 55 of the Rules of the High Court 1980, which provides –

"13.(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the court to directs at the hearing, by oral evidence."

In my judgment section 77(2) prevails over rule 13(1) because section 77(2) has been enacted by Parliament and rule 13(1) has not been made by Parliament but merely by the Rules Committee.

It is true that the Subordinate Court Rules 1980 have been made under section 4 of the Subordinate Court Rules Act 1955, which provides to the effect that rules made under that section are subject to any rules of court made under the Courts of Judicature Act 1964. Since the Rules of the High Court 1980 have been made under the Courts of Judicature Act 1964, the Subordinate Court Rules 1980 are subject to the Rules of the High Hourt 1980. But this does not mean that Order 15 rule 13(1) of the Rules of the High Court 1980 should be adopted in place of Order 49 rule 2(1) of the Subordinate Court Rules 1980, which provides –

"Appeal to the High Court shall be brought by giving notice of appeal in Form 140."

There is no question of the said Order 55 rule 13(1) prevailing over the said Order 49 rule 2(1) because there is no conflict between the two provisions. The said Order 55 rule 13(1) applies to an appeal from the decision of "any person or body of persons", whereas the said Order 49 rule 2(1) applies to an appeal from the decision of a subordinate court.

For contending that this appeal should have been brought by way of motion under Order 55 rule 13 of the Rules of the High Court 1980 reliance was placed on the ruling by the Federal Court in the case of *Yong Yoke Sung & Ors.* v. *Sungei Way Estate*[1] to the effect that an appeal similar to the present one should be brought by way of motion setting out the grounds of appeal supported by affidavit. No one should doubt the correctness of the decision of the Federal Court in that case, but I do not think that that ruling which was made in 1965 is applicable to the present day appeals from decisions made under section 69 of the Employment Act. The decision of the Federal Court in that case was made when the Rule Committee Ordinance 1955 in its old form was in force. At that time the Rules of the Supreme Court 1957 were also in force and had not been replaced by the Rules of the High Court 1980. As pointed out by Pike C.J. in that case, section 77(2) of the Employment Ordinance 1955 at that time should be read as follows:

"Subject to any rules made under section 4 of the Rule committee Ordinance 1955, the procedure in an appeal to

the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require."

In his judgment Pike C.J. stated –

"Section 4 of the Rule Committee Ordinance 1948 has been repealed and replaced by section 4 of the Rule Committee Ordinance 1955. In each section there was provision for the making of rules for 'regulating and prescribing the procedure on appeals from any court or person(s) to the Court of Appeal or the High Court' ..."

Pike C.J. was referring to section 4(b) of the Rule Committee Ordinance 1955, the relevant parts of which read as follows:

"4. It shall be the duty of the Rule Committee from time to time and as occasion may require to make rules for the following purposes –

(a) .....

(b) for regulating and prescribing the procedure in proceedings by way of appeal from any court or persons to the Court of Appeal or the High Court, the time within which any such appeal may be brought, and ..."

At that time section 4 of the Rule Committee Ordinance 1955 provided for the function of one and the same Rule Committee for making rules for regulating the procedure and the practice to be followed in the High Court and in Subordinate Courts respectively. It also provided for the function of the same Rule Committee to make rules for prescribing the procedure in proceedings by way of appeal to the High Court not only from the decisions of subordinate courts but also from the decisions of persons like the decision of Penolong Pengarah Buruh in the present case. Thus the Rules of the Supreme Court 1957 were made by that Rule Committee (established under section 3) pursuant to the powers conferred by section 4 of the Rule Committee Ordinance 1955. Therefore the Rules of the Supreme Court 1957 were rules referred to in the opening words of section 77(2) of the Employment Ordinance, *i.e.* the words "Subject to any rules made under section 4 of the Rule Committee Ordinance 1955". I believe that if they were not so, the Federal Court would not have held that Order 59 Rule 13 of the Rules of the Supreme Court 1957 applied in that case. That this was so is shown by the fact that Pike C.J. took pains to explain that the reference to section 4 of the Rule Committee Ordinance 1948 contained in the opening words of section 77(2) of the Employment Ordinance must be construed as a reference to section 4 of the Rule Committee Ordinance 1955. Pike C.J. also stressed that the opening words of the section 77(2) were not mere surplusage, on the ground that a perfectly sensible meaning could be given to them.

It should be noted that in contrast with the position at the time of the *Yong Yoke Sung's case*, the present section 77(2) of the Employment Act does not provide that the section itself is subject to any rules made under the Courts of Judicature Act 1964.

In my judgment Order 55 rule 13(2) of the Rules of the High Court 1980 does not apply also in the present case, to fix the time limit within which to initiate the appeal, because rule 13(2) applies to a particular case only on the basis and in the event that rule 13(1) applies to that case. There is also another reason why rule 13(2) does not apply to the present case. Rule 13(2) provides –

"Unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing whichever is the later date."

The question is whether there is written law which provides otherwise. The answer is that there is such written law. It has been shown above that by virtue of section 77(2) of the Employment Act the Subordinate Court Rules 1980 apply to the present case. Under Order 49 rule 2(3) of those Rules notice of appeal must be filed within 14 days from the day on which the decision was pronounced. Thus the said Order 49 rule 2(3) is a written law which is referred to in Order 55 rule 13(2) of the Rules of the High Court 1980 as written law which "otherwise provides".

On the question whether the Appellant had acted out of time the following facts and dates are relevant:–

7.2.1983:	Decision was pronounced by the Penolong Pengarah Buruh.
19.2.1983:	Notice of appeal was received in the Labour Department.
5.3.1983:	Date of notice that appeal record was ready.
18.3.1983:	Appellant's solicitor was informed by the Labour Department by phone that appeal record was ready.
5.4.1983:	Memorandum of appeal was filed in the High Court.

There is no evidence to show on what date the

notice that appeal record was ready was served on the Appellant or on its solicitor. In my judgment March 18, 1983 should be treated as the date on which such notice was served on the Appellant, because that was the date the Labour Department informed the Appellant's solicitor by phone that the appeal record was ready. The Appellant has not shown in its affidavit that such notice was served after March 18, 1983. Therefore under Order 55 rule 2(1) of the Rules of the High Court 1980 Memorandum of Appeal should have been filed not later than April 1 1983, but it was filed on April 5, 1983. The burden is upon the Appellant to show that it was filed within time. The Appellant has failed to do so. Therefore this appeal is dismissed, with costs to Selvarajah (Respondent).

Appeal dismissed.

Solicitors: *Anthony Fernandez & Partners; Lobo & Associates.*

AZIMAH BTE. ISMAIL & ORS. v. CHANG NG PANG & ORS.

[O.C.J. (Peh Swee Chin J.) September 25, 1984]
[Seremban – Civil Suit No. 117 of 1980]

Tort – Negligence – Damages – Acceptance of workmen's compensation – Whether bar to plaintiffs' claim – Set-off against agreed damages – Workmen's Compensation Act, 1952, ss. 10(6), 27(2) & (3), 28, 41(1) & (2).

Workmen's Compensation – Acceptance of workmen's compensation – Whether bar to plaintiff's claim for damages.

The deceased died in a road accident involving motor lorry AJ 3979 and another lorry BAT 9507 owned by the 4th defendant, the Government of Malaysia, the employer of the deceased who was a passenger in the latter lorry. The 3rd plaintiff, the widow of the deceased brought this action for herself and as next friend of her 2 minor children, the 1st and 2nd plaintiffs against the driver and owner of AJ 3979 and the owner of BAT 9507. Damages were agreed and liability admitted, subject to a preliminary point relied on by the 4th defendant, so that should the point be upheld by the Court, the owner of AJ 3979 had to pay the whole of the agreed damages of $60,000. The preliminary point was that since compensation of $14,000 was paid to the deceased's family, this action against the 4th defendant was therefore bad in law and cannot be maintained under s.41 of the Workmen's Compensation Act, 1952.

Held: (1) there was no evidence that the widow had applied to settle any question under s. 27(2) of the Act. The preliminary enquiry was one under s. 27(3). The memorandum of agreement signed between the widow and the 4th defendant was never recorded under s.28. The deposit of the workmen's compensation could not be said to be such damages recovered in any court;

(2) in the circumstances, judgment with costs should be returned against all defendants for $60,000 inclusive of interest, being agreed damages.

(3) the 4th defendant was at liberty to set off the sum of $14,000 against the damages.

Case referred to:

(1) *Lee Yen & Ors.* v. *Kepong Mines Ltd* [1963] M.L.J. 396.

CIVIL SUIT.

Khoo Eng Chin for the plaintiffs.
S. Kanagasabapathi for 1st & 2nd defendants.
Miss Josephine Siva (Federal Counsel) for 4th defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: The 3rd plaintiff, the widow of the deceased concerned in this running-down action brought the action for herself and as next friend of her two minor children, against the driver and owner of motor lorry AJ 3979 and the owner of motor lorry BAT 9507 respectively, both lorries being involved in the same fatal collision. Further, it is common ground that the deceased who was a passenger in lorry BAT 9507 was also an employee of the owner of the lorry (the 4th defendant) in which he was travelling.

This action took an unusual course. Damages were agreed earlier in the sum of $60,000/– inclusive of interest, so was liability admitted in proportions of 50/50 against both owners of both lorries, subject, I believe, to a preliminary point, being relied on by the 4th defendant *i.e.* the owner of lorry BAT 9507 as well as the employer of the deceased so that should the preliminary point be upheld by the Court, the claim against the 4th defendant stands dismissed with the owner of the lorry AJ 3979 having had to pay wholly the agreed damages.

The preliminary point is as pleaded in para. 7 of the defence of the 4th defendant in the following words:–

"7. Further, and in the alternative, the 4th Defendant will contend that as compensation amounting to $14,000/- was paid to the deceased's family, this action against the 4th Defendant is therefore bad in law and cannot be main-